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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950 52

No. 717 3

JOHN KEDROFF AND BENJAMIN FEDCHENKOFF, ETC.,

Appellants,

vs.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

RALPH MONTGOMERY ARKUSH,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 717

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA,

Plaintiff and Appellee,

against

JOHN KEDROFF AND BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church,

Defendants and Appellants.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 12, paragraph 3, of the Rules of this Court, the appellee files this statement disclosing the matters and grounds making against the jurisdiction of the

Court as asserted by the appellants and hereby moves to dismiss the appeal or to affirm the judgment appealed from.

I

No Substantial Federal Question Is Presented as to the Validity of the Statute Sustained Below under the First and Fourteenth Amendments (Guaranteeing Freedom of Religion).

A. *The statute fits into the historic pattern of legislation in New York on the subject of religious corporations.*

The "wall of separation between Church and State" has not prevented the state of New York from providing, at an early date (L. 1784, c. 18; 1 Jones & Varick 104), for an orderly method for the administration of properties dedicated to the use of religious groups and to preserve them from exploitation by those who might divert them from the true beneficiaries of the trust. From time to time religious corporations connected with various denominations were separately provided for, e.g. Episcopal (3 Greenl. 188, L. 1813, c. 60, §1); Dutch Reformed (*ibid*, § 2); Presbyterian (L. 1822, c. 187); Roman Catholic (L. 1863, c. 45); Methodist (L. 1867, c. 265); Baptist (L. 1873, c. 633); Lutheran (L. 1886, c. 16), etc. The Religious Corporations Law (Consol. L., c. 51; L. 1909, c. 53, as amended) names over thirty of the principal denominations.

The incorporated parish bodies so provided for, having to do with *temporal* affairs only, are to be distinguished from the *spiritual* bodies (congregations) with which they are interrelated (*Walker Memorial Baptist Church* v. *Saunders*, 1941, 285 N.Y. 462, 472). But the members of the congregation, or worshippers, do constitute the members of the corporation, whether or not they have the right to elect trustees or other officers (*Robertson* v. *Bullions*, 1854, 11

N.Y. 342; *People's Bank* v. *St. Anthony's R. C. Church*, 1888, 109 N.Y. 512).

Cathedrals have usually been incorporated by special act (*cf.* L. 1817, c. 239; L. 1843, c. 149; L. 1873, c. 222; L. 1877, c. 263; L. 1880, c. 371; L. 1890, c. 103; L. 1943, c. 405). By analogy to parish corporations, the members of a cathedral corporation would be all of the worshippers in the diocese or other jurisdiction of which the cathedral is the see.

The earliest provision for Orthodox parish corporations was made in 1871 (L. 1871, c. 12). The incorporators and trustees were limited to the Russian ambassador and consul general. The enactment became §§ 50 and 51 of the Religious Corporations Law of 1895 (L. 1895, c. 723) and §§ 90 and 91 of the 1909 law, later renumbered as §§ 95 and 96.

In thus concerning itself with religious corporations the state does not interfere with religion (*cf. Roberts* v. *Bradfield*, 1898, 12 App. D.C. 453, 471) but discharges its responsibility as supreme guardian of property devoted to religious uses (*cf. Matter of Trustees of N.Y.P.E. Public School*, 1864, 31 N.Y. 574, 592). In this capacity the state grants the corporate franchise to the temporal bodies, permits them to become vested with estates in perpetuity for their corporate purposes and regulates their administration of the temporalities with which they have been endowed.

On its face, then, Article 5-C indicates no violation of fundamental rights.

B. *The legislative finding (Rel. Corps. L., § 105) that the metropolitan district created in April, 1924, was* de facto *identical with the diocese then existing, is supported by the evidence.*

The appellants failed to prove that the metropolitan district known as Russian Orthodox Greek Catholic Church of North America and created at the Detroit Sobor of April,

1924 (which district will be referred to as the American Church), did not comprehend every church in the North American Diocese as it then existed. It is true that 6 delegates voted against the creation of a temporarily self governing body and 2 abstained (931[1]), but there is no evidence that their churches, or those which did not send any delegates, attempted later to maintain administrative relations with the Moscow patriarchate. After Metropolitan Benjamin arrived in 1933 he may have founded some new churches and there may have been some attempted defections from the American Church to him. Judge Conway credits him with 13 parishes (302 N.Y. at p. 16), which is more credible than his own figure of 50, which he failed to substantiate (678-680). It is significant that not a single church is listed in the United States government report on local congregations compiled as of 1936 (*Religious Bodies—1936: Statistics, History, Doctrine, Origin and Work*, Bureau of the Census, 1941) as being under the administrative jurisdiction of the patriarchate. This is eloquent evidence that Benjamin found no patriarchal churches here on his arrival.

De facto, at any rate, then, the diocese became the American Church and, as a diocese, ceased to exist. This was virtually admitted by the patriarchate when it quoted Benjamin as reporting in 1934 that "our North American Diocese has begun official existence" (1107). Judge Conway correctly refers to Benjamin's jurisdiction as a "new diocese" (302 N.Y. at pp. 16, 20).

The appellants' assertion that the churches represented at Detroit in 1924 "had belonged to a larger group" is not supported by the evidence and is contrary to the legislative finding as to the historic fact.

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[1] Numbers in parentheses refer to the folios of the printed "Case on Appeal".

C. *The legislative mandate (Rel. Corps. L., § 107 subd. 1 and 3) does not affect any churches founded since April, 1924, with the intent of adhering to the administration of the patriarchate.*

The appellants read the statute as "dispossessing" the Patriarchal Church "from all its properties" and "preventing any of its churches from existing in this state"—and, again, as "outlawing a Church in its entirety"—and, again, as suppressing the Patriarchal Church—and the like.

No such effect can be read into the statute or derived from the judgment below.

The term "Russian Orthodox church," as used in the statute, is a word of art, limited to "a church, cathedral * * * founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission, diocese or autonomous metropolitan district hereinabove defined as the Russian Church in America." (§ 105).

The mandate contained in § 107 applies only to a "Russian Orthodox church" as that term is defined in § 105. Therefore the mandate does not apply to churches founded since April 2-4, 1924, with the intent of adhering to the patriarchal administration. There is no proof that any of Benjamin's churches were founded before that date. In fact there is no proof that Benjamin has any churches in the state today.

In no sense does the statute "outlaw" the Patriarchal Church, "suppress" it or "dispossess" it of its properties. Only a property—like the cathedral here—which had been dedicated prior to April, 1924, and of which Benjamin had obtained *de facto* control since, would be affected.

Benjamin and all of his followers are left free to worship in any buildings which were not part of the diocese on April

2-4, 1924. That this is a reasonable limitation on his rights will be shown below.

D. *The legislature is deemed to have found and to have known the circumstances which forced the American Church to declare its temporary autonomy and the process by which the patriachate has been subjugated by the Russian government and used as its tool.*

In ascertaining the factual background of legislation the Court is not limited to the evidence or findings in the record before it or even to facts of which it may take judicial notice according to the technical rules. It may consider "any state of facts either known or which could reasonably be assumed" (Jackson, J., concurring and dissenting, each in part, *American Communications Ass'n* v. *Douds*, 1950, 339 U. S. 382 at p. 423 n. 1, quoting from opinion of Court in *United States* v. *Carolene Products Co.*, 1938, 304 U. S. 144, 154; see, also, opinion of Conway, J., below, 302 N. Y. at pp. 30-33).

In 1945 and 1948 considerable information on the Church in Russia had been published by reputable scholars.[2]

The legislature was also possessed of facts of general knowledge in regard to "the character and method of operation of international communism and the Soviet attitude toward things religious" (302 N. Y. at pp. 32-33).

The records of the Court of Appeals were also accessible to the legislators. Three times, prior to the present action, that Court had considered the problems of the American

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[2] See, for example, J. S. Curtiss: *Church and State in Russia*, 1940; W. C. Embardt: *Religion in Soviet Russia*, 1929; F. McCullagh: *The Bolshevik Persecution of Christianity*, 1924; M. Spinka: *The Church and the Russian Revolution*, 1927; R. P. Casey: *Religion in Russia*, 1946; G. P. Fedotoff: *The Russian Church Since the Revolution*, 1928; N. S. Timasheff: *Religion in Soviet Russia*, 1942; P. Miliukov: *Outlines of Russian Culture—Pt. I, Religion and the Church*, 1942; P. B. Anderson: *People, Church and State in Modern Russia*, 1944.

Church arising out of the changed conditions in Russia (*Kedrovsky* v. *Rojdesvensky*, 1926, 242 N. Y. 547; *Kedrovsky* v. *Russian Catholic Church*, 1928, 249 N. Y. 75; *Waipa* v. *Kushwara*, 1940, 283 N. Y. 780).

E. *The legislature must be deemed to have found that the declaration of administrative autonomy in April, 1924, was compelled by circumstances beyond the control of the American faithful.*

It is unnecessary to repeat here the circumstances, which are graphically related by Judge Conway. Suffice to point out that the delegates were confronted with a double peril, the loss of their ruling bishop, Platon, accused of acts of "counter-revolution" *i.e.*, publicly expressed disapproval of the Soviet regime (336; *cf.* Gsovski: *Legal Status of the Church in Soviet Russia*, 8 Fordham L. Rev. 1, 25-29), on the one hand and, on the other, the seizure of all the church properties by the schismatic Kedrovsky, representing a group that had declared "capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians" (typewritten copy of Plaintiff's Exhibit 6A, p. 1). In either event the diocese would be dominated by the atheistic Bolshevik government. "The debate * * * showed the unanimous desire of the members of the Sobor to keep our American Church from Soviet interference" (927).

F. *The legislature must also be deemed to have found that the American Church has been compelled, by circumstances beyond its control, to insist on maintaining its administrative autonomy.*

On each occasion of negotiations for restoring the spiritual unity which had been broken by unilateral action of the patriarchate, the subjection of that office to the Kremlin has compelled the American Church to insist on administrative

autonomy. Benjamin himself testified at the trial that the policy of the central church authorities to require an obligation of loyalty to the Soviet regime from the clergy outside Russia had continued to the present time (659-660). Even although "loyalty" means only refraining from public disapproval of the Communist rulers, it is an impossible condition for American citizens.

The American Church is a member of the newly formed National Council of Churches. Imagine its position if it were administratively subject to the patriarchate and asked to subscribe to a statement, say, condemning slave labor in the U.S.S.R.!

G. *The legislature must be deemed to have found that the patriarchate has been subjugated to the Communist masters of Russia to such an extent that it is no longer capable of functioning as the head of a free international religious body.*

On this issue (which the Court of Appeals characterized as "determinative" apart from the statute, 302 N. Y. at p. 22), the members of that court, and of the Appellate Division, appear to have divided, not so much as to the actual facts, but as to the propriety of presuming knowledge in the legislature.

If there is one fact today which can be said to be within the common knowledge—of judges, of legislators, of every literate person in the world, on either side of the Iron Curtain—it is the all pervading pressure of the Communist state on the persons within its power.

> "Even the intellectual and spiritual ties by which men are held together, are so controlled by the totalitarian state as ultimately to disintegrate all autonomous groups outside of the state itself, or the single political party that rules it. That technique is applied to scientific and cultural as well as to religious groups,

so that ultimately no autonomous group with any independence remains. In the final analysis, the state and the state alone becomes all. It involves a retreat from reality if we do not clearly see that. In this case the technique of suppression, and the attempted use of a religious group merely as an instrumentality to serve the all-embracing and dominant ends of the Soviet state, is the real issue presented. The so-called 'Russian church at large', so frequently mentioned by respondents, is in reality and unfortunately the Russian church group whose high ranking functionaries have been completely subjected and dominated by the men who control the Politburo, and the relatively small group that constitutes 'the party', through whom the vast millions in Russia and Soviet-dominated satellite countries are regimented and controlled."

Van Voorhis, J., dissenting, below, 276 App. Div. at p. 331.

The appellants, as well as the dissenting opinion in the Court of Appeals (302 N. Y. at p. 37), object to the statements in the prevailing opinions on the subject as amounting to a new finding, without evidentiary support in this record, and in the face of contrary testimony, and express contrary findings by both courts below. It will be shown that on all of these counts the appellants and the dissenting judges are mistaken.

1. *No new finding:* The Court of Appeals did not purport to make a new finding but merely presumed a legislative finding on the subject.

2. *Evidentiary support:* Naturally the appellee did not issue letters rogatory to examine Patriarch Alexy on the subject! As Mr. Justice Van Voorhis (276 App. Div. at p. 332) quoted from Lord Mansfield:

"It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the

power of one side to have produced and in the power of the other to have contradicted."

Blatch v. *Archer*, 1774, K.B., Cowp. 66, quoted in 2 Wigmore on Evidence, § 285.

Nevertheless, there is sufficient evidence in the record to sustain the presumption of a legislative finding.

From the day when Patriarch Tikhon was arrested, the record shows that the central church authorities have been permitted to act only as mouthpieces of the government. From 1922 to 1927 the central office of the Patriarchal Church was suppressed (510-512). The only functioning officials in that period were the schismatics who had declared "capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians." The Government had arrested thousands of priests and bishops to help this group (550-553). After the Patriarch was released from prison he was confined to a monastery, became sick, had heart attacks (905). Under these circumstances he issued, with his Synod, an ukase dismissing Metropolitan Platon because of "acts of Counter-Revolution directed against the Soviet power" (1098-1099). This act of Tikhon was doubtless performed under duress (723; 920-921). In 1927 Sergius gave a pledge of loyalty to the State (489-490) and demanded a similar pledge from all the clergy abroad (612; 614-615). In that same year Stalin told the American Trade Union Delegation that the trouble was only that the reactionary clergy were not yet fully liquidated (1035). This statement reflected the position of the Government (521-522).

The policy requiring loyalty to the Soviet regime from the clergy outside the USSR has continued to the present time (659-660). Why should that be, if the Patriarch is free?

Metropolitan Benjamin advised Alexy just prior to his election as Patriarch that an essential condition of reunion between the mother church and the American Church was

the fullest loyalty to the Soviet power (660). Why so, if the patriarchate was free?

The patriarchate has repeatedly refused to recognize the autonomy of the American Church (1097-1121; 1081-1088; 684-685; 826). Why this insistence on retaining administrative control over a few hundred parishes in America while full autocephaly was granted to the Orthodox Church of Georgia (1239)? Obviously, because the Kremlin does not need an intermediary to control the Church in one of the constituent republics of the Soviet Union.[3] No reason, other than a political one, appears for granting full independence to this presumably large body and not even an autonomous status to the American.

3. *Contrary testimony of little weight:* There is no more significant proof of the subservience of the central church dignitaries to the Soviet power than the testimony of Metropolitan Gregory (829-832). He is a permanent member of the Holy Synod (813).

His testimony is indeed a roseate picture. It is somewhat marred by the following facts, all of which are in evidence:

(a) More than half of the churches in Russia were closed at the beginning of the Revolution, the number diminished from year to year; before the last war it was only one-tenth of the former number (585);

(b) No religious tracts were distributed in Russia (589);

(c) The separation [of Church and State] was in fact a robbing of the Church and depriving it of all activities (582);

(d) No religious society in Russia has the right to own private property or to enjoy the right of a juridical person (840; Decree of January 23, 1918; §12;

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[3] As of July 1, 1941, the estimated population of the Georgian republic was 3,722,252 of which 67.7% was of Georgian origin (*USSR: A Concise Handbook*, Cornell Univ. Press, 1947, pp. 6-7).

Gsovski: *Legal Status of the Church in Soviet Russia*, 8 Fordham L. Rev. 1, 10 n. 46);

(e) The civil law of Russia does not recognize the Church as an associated body, the governing organs of which have jurisdiction over the lower units; the latter are autonomous and need not obey the orders of the former (338-342; Instruction of the People's Commissariat for the Interior of October 1, 1929, No. 328, §5; Gsovski, *op. cit.*, p. 9, n. 43);

(f) The Soviet Government did not permit a lay delegate of the American Church to attend the Moscow Sobor of 1945 and prevented the two clerical delegates from arriving on time (1049-1054).

Metropolitan Gregory's testimony that the Patriarchal Church is functioning freely without interference by the civil authorities might be literally true and still the Patriarch and his synod might be puppets of the Kremlin. Witness the recent announcements by the patriarchate as published in its own journal or in the press.[4]

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[4] "*Paris*, April 1—A new campaign to stamp out religious influence in the Soviet Union is reported to be under way. This drive apparently is directed against minor and local clergy and not against the top hierarchy of the Russian Orthodox Church, which is completely and officially in sympathy with the Communist Government.

* * * * * * * * *

The top of the Sovet [sic] orthodox hierarchy meanwhile has become so active in its open support of the Government that its official publications are now engaged in heated attacks on the Western powers and definitely mixing in lay politics.

The last issue of the Journal of the Moscow Patriarchate to reach here contained a long diatribe against so-called United States and British 'war mongers' in an article entitled 'The Devilish Spirit of a New Aggression Threatening the People's Peace' * * *."

The New York Times, April 2, 1948.

"*Moscow*, Aug. 6—Alexius, Orthodox Patriarch of Moscow and all Russia, declared today that the excommunication of all persons support-

Let it be assumed that, as reported in The New York Times of April 2, 1948, "the top hierarchy of the Russian Orthodox Church * * * is completely and officially in sympathy with the Communist Government." Then when its official publications, as reported in the same article, engage "in heated attacks on the Western powers," the hierarchy is simply expressing its feeling of "sympathy"; it is not suffering "restraint", "molestation" or "interference".

So, again the Church might be functioning "freely" in Russia, even although it had been deprived of substantial means, its clergy reduced in social position, its authority to teach religion to children restricted and its organizational type changed from associated to congregational (Tima-

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ing Communism 'would fundamentally contradict the main tenets of the orthodox Christian faith.'

Alexius' statement was published in Izvestia, Government newspaper, along with a series of questions eliciting it that had been submitted by a Reuter's news agency correspondent in Moscow.

Alexius furthermore declared there could be no conflict between loyalty to the Soviet state and loyalty to the Russian Orthodox Church.

'Such a conflict,' he said, 'not only does not exist but also cannot exist if believing people will adhere to the precise meaning of the evangelical commandments and testaments of the Apostles.'

* * * * * * *

The declaration by the Patriarch of Moscow on the question of a conflict between the Soviet state and the church asserted that 'to this question there can be only one answer.' This was reminiscent of a statement by Alexius somewhat more than a year ago when, on being asked whether there was any conflict between the theory and practice of communism on the one hand and religious belief on the other, he replied: 'The Orthodox Church has no conflicts whatsoever within the Soviet state.'

At that time he declared that freedom of religion was guaranteed by the Soviet Constitution, that the number of churches was increasing and that 'from Stalin the church has received a favorable support on all church questions that arise.'

* * * * * * * *"

The New York Times, August 7, 1949.

sheff: Religion in Soviet Russia, p. 24-28; 38-45; 49-53; Gsovski: Legal Status of the Church in Soviet Russia, 8 Fordham L. Rev. 1 *et seq.*). In other words, it might be "freely" exercising the narrowly curtailed functions which it was permitted to retain.

But the appellants offered no proof to the effect that the Patriarch and the members of his synod were not completely *controlled* by the Government. Churches might be open for worship, parish priests might be conducting services, even seminaries and academies might be educating candidates for the ministry, and still the top hierarchy might be only a department of the Soviet Government, wholly subject to the will of the civil power. That is the fact which the appellants have failed to disprove and, therefore, the legislature is deemed to have found.

The legislature may not have taken the Soviet brand of religious "freedom" at its face value.

> "* * * The persecution of Christianity in Russia in the years following the revolution was communism at its most honest. The later 'freedom' of religion—with its back broken—was communism at its most deceitful." (Editorial in Wall St. Journal, Feb. 14, 1949).
>
> "* * * The church has again an official place in the Soviet Union, but as an agency of the state; on the same terms the religious leaders being imprisoned and executed as 'traitors' in the countries under Soviet control would be tolerated. When Caesar is also God there can be no divided tribute." (Anne O'Hare McCormick, The New York Times, April 8, 1950).

The appellants stress Sergius' mention of the "contradiction which exists between us Orthodox and the Communist Bolsheviks, who govern our Union" (1030). That was said on June 10, 1927. But according to The New York Times of August 7, 1949, Patriarch Alexy, on being asked whether there was any conflict between the theory and prac-

tice of communism on the one hand and religious belief on the other replied: "The Orthodox Church has no conflicts whatsoever within the Soviet state."

4. *No express contrary findings by lower courts:* The trial justice did not mention the subject.[5] The prevailing opinion in the Appellate Division contained no affirmative finding on the subject, but contained these words (276 App. Div. at p. 318):

> "* * * we disagree with the conclusion drawn as to the nonexistence of the Russian Orthodox Church in Russia, because we believe that we may not draw that conclusion on this record, even if we might desire to do so."

The Appellate Division was of the opinion that the dealings between the American Church and the patriarchate precluded any finding that the Church in Russia was nonexistent. The dissent in the Court of Appeals also contains a remark that the "plaintiff itself seems not to cast so cold an eye on the Patriarch" (302 N.Y. at p. 38).

5. *The American Church has never waived its contention that the Soviet dominated patriarchate is disqualified to act as its administrative superior:* Both the majority in the Appellate Division and the minority in the Court of Appeals fail to distinguish between the *spiritual* and *administrative* qualities of the office of Patriarch.

The name *Patriarch of Moscow and All Russia,* to a Russian Orthodox, stirs sentiments of pride and reverence, quite apart from his estimation of the particular incumbent.

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[5] The appellants allege that the issue was not raised at the trial. The appellee did give fair warning through its counsel that the political conditions in Russia would be used as an argument that the doctrine of denominational control (*Watson* v. *Jones,* 1871, 13 Wall. [80 U. S.] 679) should be modified in this case, apart from the statute (264-267; 277-280). The appellants' counsel expressly referred to this argument and attempted to meet it (527-528; 541-542; 583-601; 829-830).

He is required, in his liturgical worship, to pray for the head of the Church, as well as for all of the other Patriarchs of the East and other hierarchs. The Court may note that when the witness Fedotov testified under cross-examination that the official book "The Truth About Religion in Russia" was "untruth" and was asked

> "Q. You say the Patriarch of Moscow published untruths, is that it?"

he replied

> "A. It is against my feeling, but I must" (577).

This feeling of reverence for the spiritual office is shown throughout the record. The American Church never broke off spiritual communion with the Patriarch; it was the patriarchate that laid an interdict on the American Church.

But at the same time the American Church has always safeguarded its *administrative* independence. It has insisted on the right of self government.

The gist of the matter is this: that in his *spiritual* quality the Patriarch continues as head of the Church, no matter how subjugated or servile, but as *administrative* head he is disqualified so far as concerns the American Church.

Parenthetically, he has also lost his function as administrative head of the Church in Russia, for that body has become of the congregational type by force of Russian civil law (338-342).

The Appellate Division misunderstood the position of the American Church in regard to the Patriarch and his synod. To treat Alexy as a "holy man" 276 App. Div. at p. 319 because he is occupying an office of great symbolic value does not disentitle the American Church from refusing to accept him and his synod as a supreme administrative organ. The King of England is accepted by the members of the Commonwealth as a symbolical, not administrative, head.

The Appellate Division alluded to the Church in Russia or the Patriarchate being "restored" since 1945 (276 App. Div. at pp. 319-320). There is no such proof in the record. The Russian Church, as an authentic, real, valid branch of the Orthodox communion, has continuously existed, as has the office of Patriarch or patriarchal *locum tenens*, since the Revolution, although from 1922 to 1927 the central office was suppressed.

The real question is whether a top hierarchy, which can function other than as a department of the Soviet Government, has been restored. The appellee contends that it has not, and that the American Church has never dealt with it as if it had.

The Court, therefore, is not precluded by any acts of the American Church from presuming a legislative finding that the top hierarchy, because they are willing and servile tools of the Kremlin, are disqualified to function as the administrative superior of the American Church.

H. *The legislative mandate (Rel. Corps. L., § 107) is a reasonable exercise of the power, for the common welfare, to ascertain the administrative authority which may be relied upon to carry out more effectively and faithfully the purposes of a religious "trust".*[6]

This is a proper field of legislative action.

"* * * Throughout our whole existence, learning, piety and benevolence—every truly charitable object

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[6] The words "trust" and "trustee" in this connection are not used in a technical sense. A gift to a religious corporation for its general purposes does not create a technical trust (Restatement of Trusts, sec. 348, intro. Note; 3 Scott on Trusts, § 348.1; *ibid.*, 1950, Supp.; *St. Joseph's Hospital* v. *Bennett*, 1939, 281 N. Y. 115, 121). The corporation takes "the whole legal and equitable interest in the gift" (*Levy* v. *Levy*, 1865, 33 N. Y. 97, 116; *Reformed P. D. Church* v. *Mott*, 1838, Ct. Ch., 7 Paige 77,

—has been amply encouraged, the result being attained through the medium of corporate bodies created by the legislative power * * *

* * * In all civilized societies, the dissemination of religion and charity, are objects to justly engage the attention of the law making power; but it is a necessity of the subject that trusts or uses for the promotion of these objects, which affect the public interests and well being, should be created under legislative sanction and control. * * *"

Levy v. *Levy*, 1865, 33 N. Y. 97, 112, 115.

Under normal circumstances the administrative authority which "may be relied upon to carry out more effectively and faithfully the purposes" of a religious "trust" (opinion below, 302 N. Y. at pp. 14, 21, 24, 30, quoting from opinion in *Kedrovsky* v. *Russian Catholic Church*, 249 N. Y. at pp. 77-78) is the governing body, if any, to which the religious corporation is subject, according to the discipline, rules and usages of the denomination with which the corporation is connected. A statutory provision applicable to all religious corporations commands such denominational control (L. 1875, c. 79, § 4, now Rel. Corps. L., § 5) [7] and it is the law generally, apart from statute (*Watson* v. *Jones*, *supra*).

However, the rule of denominational control is not to be read into the First and Fourteenth Amendments as an inflexible restraint on legislative action, "not subject to change or modification by the same legislature which an-

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52; *Bird* v. *Merkles*, 1895, 144 N. Y. 544, 551). There is no separation of legal and beneficial ownership, since the members of the corporation are identical with the worshippers to whose use the property has been dedicated.

[7] Before this enactment in 1875 religious corporations could administer their properties in accordance with their own by laws, regardless of denominational rules (*Robertson* v. *Bullions*, 1854, 11 N. Y. 243; *Hartford Baptist Church* v. *Witherell*, 1832, 3 Paige 296; *Bellfort* v. *Tooker*, 1859, 29 Barb. 256, aff. *sub nom. Petty* v. *Tooker*, 1860, 21 N. Y. 267).

nounced it, in cases where literal enforcement would be unreasonable and opposed to the public interest" (302 N. Y. at p. 30).

Even without legislative action, the rule of denominational control is not inflexible.

> "* * * it may well be that the civil courts will interfere in a case where it is shown that the controlling authority of a general church has indisputably abandoned fundamental and characteristic doctrines and beliefs to the diversion of church property from the objects and purposes of the implied trust to which it is subject. Mack *v.* Kime, 129 Ga. 1, 58 S. E. 184, 24 L. R. A., N. S., 675; 23 R. C. L. 449."
>
> *Trustees of Pencader Presbyterian Church* v. *Gibson*, 1941, 19 Del. Ch. Ap. 375, 391, 22 A. 2d 782, 789.

Also, even without the aid of a statute, the courts are not always bound to accept the ruling of a church judicatory.

> "We think it doubtful whether the Supreme Court [in *Watson* v. *Jones*] intended to announce a principle without limitation or exception. It seems probable that when the occasion arises it will align itself with the courts which have limited the application of its announced principle. See 24 L. R. A., N. S., 698."
>
> *Reformed Bethanien Church* v. *Ochsner*, 1948, 72 So. Dak. 150, 165, 31 N. W. 2d 249, 257.

For cases where the courts have refused to be bound by the action of church bodies, see

Grupe v. *Rudisill*, 1827, 101 N. J. Eq. 145, 165;
Wallace v. *Trustees of General Assembly*, 1902, 201 Pa. 292;
Jennings v. *Scarvorough*, 1894, 56 N. J. L. (27 Vroom) 401.

When it is clear that the ecclesiastical tribunal lacked jurisdiction, its ruling is not binding on the civil court,

e.g., if a church court imposed a death sentence for murder (*Watson* v. *Jones*, 13 Wall. at pp. 732-733). It is clear that the patriarchate had no jurisdiction to restrict the civil liberties (freedom of speech) of the American clergy. Metropolitan Benjamin could cite no authority for requiring "loyalty" from the clergy outside Russia other than the words of Jesus "Render unto Caesar", etc., but he was not permitted by the trial court to explain what Jesus would have said if there had been two Caesars (653-655). The American clergy should not be required to give double allegiance.

This thought can be no better expressed than in the words of the American Church in the statement explaining the rejection of the Patriarchal ukase of February 16, 1945 (1076-1078):

> "* * * The American Church is flourishing in the atmosphere of democratic freedom. It was no fault of the American branch of the Russian Orthodox Church that by force of circumstances it was compelled to establish its own church administration. It was no fault of the American Church that the Patriarchate laid a suspension on it because its clergy declined to give a pledge of loyalty to the Soviet power.
>
> It is an American Church and an American Church it must continue to be."

In the case of religious trusts the state law is supreme.

> "* * * the law, whose supremacy, over all ecclesiastical rules and regulations, when rights of property are concerned, is not to be questioned."
>
> *Krauczunas* v. *Hoban*, 1908, 221 Pa. 213, 225, 70 Atl. 740.

In the case last cited a Pennsylvania statute required lay control of church property, although the rules of the Roman Catholic Church required the property to be held by the

bishop. The court compelled the bishop to convey the parish property to the congregation. When the bishop sought to evade the effect of this decree by laying an interdict on the congregation, who were thus compelled to use a non-Catholic minister for their services, the court refused to enjoin such use of the property (*Novickas* v. *Krauczunas*, 1913, 240 Pa. 248, 87 Atl. 686).

The legislature, therefore, acted reasonably in designating the American Church, rather than the patriarchate, as the "trustee" which "may be relied upon to carry out more effectively and faithfully the purposes of this religious trust" i.e. the administration of the properties which were part of the diocese prior to April 4, 1924, or dedicated to the American Church since then.

I. *The validity of the statute may also be based on the cy près prerogative of the sovereign.*

This point was not stressed by the Court of Appeals but was mentioned in the dissent in the Appellate Division (276 App. Div. at p. 338).

As the successor to the prerogative of the English Crown, the *parens patriae*, the state may exercise the *cy près* power in a manner similar to the judicial exercise authorized by statute (Real Property L. § 113, subd. 2; Personal Property L. § 12, subd. 2). In the present case it is to be presumed that the donors of the premises intended that it be used for the benefit of members of St. Nicholas parish or the North American diocese, as the case might be, in accordance with the faith, dogma, doctrine, canons, discipline, rules and usages of the Russian Orthodox Church. As has been shown, no trust in a technical sense arose from those gifts but the appellee is bound to use the gifts for the purposes intended by the donors as presumed from the language of the gifts, unless circumstances have so changed as to render

impracticable or impossible a literal compliance with that intent. For example, in a case where the charter of an Episcopal church provided that on dissolution the assets should go to some other Episcopal church in the neighborhood but there was an adequate supply of such churches, the court decreed that the assets should go to the Episcopal diocesan board of trustees for missionary and extension work (*In re Free Church of St. Barnabas,* 1949, Pa. C.A. Berks Co., 41 Berks 215; *cf. Sherman* v. *Richmond House Co. No. 2,* 1921, 230 N.Y. 462).

This is a situation apt for the application of *cy près.* The intent of the donors may still be carried out except in one particular, viz., administrative control by the authorities in Russia. Compliance with that term has become impracticable, because of the subjection of the Moscow dignitaries to the Soviet regime.

The circumstances have changed, therefore, to such an extent that the legislature may exercise the *cy près* prerogative (*cf. Will of Lott,* 1927, 193 Wis. 409, 412-414; *Williams Estate,* 1944, Orphans Ct. Tioga Co., 52 Pa. D. & C. 107, 111-112).

3. Legislative action was called for because of the difficulties of obtaining evidence technically competent in judicial proceedings.

The courts of New York had been burdened with legislation over Russian Orthodox church properties for a quarter of a century.[8] The obstacles to obtaining evidence in Russia without the cooperation of the Soviet government were insuperable. The situation demanded legislative action. The legislature was not hampered by technical rules of

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[8] Besides the three cases which reached the Court of Appeals there were many suits in the lower courts.

evidence. It could act on a mass of information, however obtained.

K. *The statute does not purport to decide any ecclesiastical question.*

The appellants would have it appear that the legislature was concerning itself with questions of canon law. This is not so. The statute deals solely with the custody and administration of the temporalities of incorporated churches, cathedrals, etc.

Nevertheless it may not be amiss to answer briefly the aspersions cast by the appellants on the canonical position of the American Church and its place in the Apostolic Succession.

The canonical position is based on the ukase of Patriarch Tikhon, No. 362, of November 20, 1920 (889). It was referred to at the Detroit Sobor although the speaker inadvertently dated it in 1921 (923-924). It has been consistently relied on through the years (350-351; 761-763; 1228-1232). It was not limited to dioceses in Russia and was applicable to the North American diocese.

The adherence of the American Church to the Russian Church Abroad (Karlovci-Munich Synod) was to stop the confusion arising from parallel jurisdictions (1205-1214). The connection has been ended and is of no moment here.

The appellants need not worry as to the Apostolic Succession. That doctrine transmits the sacerdotal grace through the sacrament of Holy Orders irrespective of censures, interdicts or even excommunication. For example, the Papacy recognized ordinations in England even while the English Bishops were under interdict. In his brief *Regimini Universalis*, October 30, 1555, Pope Paul IV declared that only those Bishops and Archbishops who were not ordained and consecrated in the form of the Church

cannot be said to have been validly and lawfully ordained [in the reigns of Henry VIII and Edward VI]" (1 Lowndes: *Vindication of Anglican Orders,* p. 59). If Pope Leo XIII had not recognized the possibility of the Apostolic Succession being retained by, in his eyes, a schismatic and heretical Church, he would not have issued his bull *Apostolicae Curae,* September 15, 1897, appointing a commission to examine into the validity of Anglican orders (2 Lowndes, *op. cit.,* appendix, p. vii *et seq.*).

But, in any event, as has been shown, Article 5-C compels no one to join the American Church. It does prevent a foreign government from seizing its properties.

L. *The mandate of the statute is in the historic American tradition.*

It would amaze Madison and Jefferson to learn that the doctrine of religious liberty was being invoked to help a foreign bishop, the puppet of a totalitarian state, to seize control of American church property! There was widespread opposition in the colonies, even among Anglicans, to receiving English bishops, on account of their close connection with the English government (1 A. P. Stokes: *Church and State in the United States,* pp. 231-240).

It was the existence of the state controlled churches in Europe and in various colonies that led to the cry for religious freedom. The political independence of America was soon followed by the independence of the American churches.

"From being *appendages of national churches in Europe,* they now become national churches themselves in this new Empire" (from a letter of Rev. Edward Livingston, quoted in Stokes, *op. cit.,* vol. I, p. 720). The Dutch Reformed were connected with the Church in Holland (Stokes, *op. cit.,* vol. I, pp. 749-752; *cf. Miller* v. *Gable,* 1845, Ct. Ch., 2 Denio 492, 511). Other churches with European connec-

tions were the German Reformed (1 Stokes, p. 748), Lutherans (*ibid.*, p. 765), Moravians (*ibid.*, pp. 774-775), as well as, of course, the Episcopalians. All of these became independent after the Revolution.

It is true that the Church of England consecrated bishops for the American Episcopal Church. Even so, if the rule of denominational control had been pushed to the extreme point contended for by the appellants here, a single parishioner could have insisted on the continuance of the ancient connection.

> "* * * Public opinion would not have borne it [such a result]. Yet every Episcopal congregation in America had been founded on the basis of that connexion, and our independence in other matters had raised no unanswerable objection to its permanence, especially, after the Bishop of London had procured an act of Parliament to dispense with engagements by the American Episcopal clergy that would have interfered with their political allegiance. It is true that the separation was effected with the assent of the mother church; but it was the parishioner here, and not the church abroad, whose consent was necessary to a dissolution of his ecclesiastical relation, in order to impair his civil rights. Besides, the consent of the mother church was only formal, and given to the separation as to a measure which she could not prevent. She indeed conferred the episcopate, and thus secured a continuance of the apostolic succession to the American Episcopal Church; but that might have been had from the nonjuring bishops in Scotland, as it was by Doctor Seabury, or from the Danish Episcopal church, which indeed offered it on terms of signing the thirty-nine articles of the church of England, with the exception of their political parts. Had the offer been accepted, there would have been an adverse withdrawal of ecclesiastical allegiance—in principle the very case before us—and it will not be pretended that the majority of an Epis-

copal congregation here would not have been at liberty, in that event, to form a connexion with an independent Episcopal church government, without forfeiting the interest of each in the church property."

Presbyterian Congregation v. *Johnston*, 1841, 1 W. & S. (Pa.) 9, 39.

In other words, the rule of denominational control is not so inflexible as not to yield to political changes (*cf.* Zollman: American Church Law, rev. ed., 1933, p. 239).

M. *The mandate of the statute is in the historic Orthodox tradition.*

The Eastern Church has never had the cohesion of the Western (Roman Catholic). Administrative ties have been readily broken as the result of political conditions. The Russian Church itself existed for over a century as a *de facto* independent body without the consent of its *de jure* superior authority (opinion of Van Voorhis, J., below, 276 App. Div. at pp. 341-342; R. P. Casey: *Religion in Russia*, 1946, p. 7; B. H. Sumner: *Survey of Russian History*, 2d ed., 1947, p. 185; B. Pares: *History of Russia*, 1937, p. 83). The modern Orthodox Churches of Serbia, Albania, Roumania and Bulgaria broke off administrative ties with the Patriarch of Constantinople without his blessing and in the face of his interdict, as the result of their countries winning political independence from Turkey.

"* * * as soon as ever a Balkan State gets independent of the Sultan it makes its Church independent of the Patriarch * * * So it has became a regular principle that wherever there is a free State, there shall be a free and independent National Church."

A. Fortescue: *The Orthodox Eastern Churches*, 1929, c. XI.

N. *The appellant Benjamin has shown no abridgement of his religious freedom.*

He is free to exercise his religion without restraint. But he is not permitted to occupy St. Nicholas Cathedral. The legislature has decreed that the American Church is a more reliable "trustee" of that property than the Moscow patriarchate. There are facts supporting the reasonableness of that determination.

NOTE

The appellants make much of an act passed in 1943 and signed by Governor Dewey (L. 1943, c. 145), relating to the so-called Federated Orthodox Greek Catholic Primary Jurisdictions in America. No evidence as to this organization appears in the record. It is evidently a dead letter, without the adherence of the American Church. However, as the dissent in the Court of Appeals brings in a speech of Governor Dewey delivered in 1943 in which he referred to Metropolitan Benjamin as the successor of the rulers of the American mission and diocese (302 N. Y. at p. 44), it may be permissible to quote a recent letter from the Governor to the present head of the American Church.[9] The Governor has evidently revised his opinion of the chief appellant.

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[9] Metropolitan Theophilus died after the argument in the Court of Appeals.

State of New York
EXECUTIVE CHAMBER
Albany

Thomas E. Dewey
Governor

December 22, 1950.

Archbishop Leonty
Russian Orthodox Greek Catholic Church
of North America
Holy Virgin Protection Procathedral
59 East 2nd Street
New York, New York

DEAR ARCHBISHOP LEONTY:

I have your gracious telegram conveying greetings from the Eighth All-American Sobor of Russian Orthodox Greek Catholic Church of North

II

No Substantial Federal Question Is Presented as to the Validity of the Statute under the Fourteenth Amendment (Securing Vested Property Rights).

The dedication of property to religious use, by absolute gift to a religious corporation, vests no property rights in any members of the corporation or of the general body with which the corporation is connected (*Westminster Presbyterian Church* v. *Presbytery*, 1911, 142 App. Div. 855, 875; *Girard* v. *Philadelphia*, 1868, 7 Wall. 1, 14; *Canovaro* v. *Brothers of Hermits of St. Augustine*, 1937, 326 Pa. 76, 88-96). The corporation itself has full ownership, subject to the duty of applying the property to the use intended by the donors.

In the case at bar, the intended use was, in the first instance, as a place of worship and parish house for the local congregation, later as a central place of worship and administrative center for the whole diocese as it existed prior to April 1924. The actual identity of that diocese with the present American Church has been determined as a fact by the legislature (Rel. Corps. L. § 105). When, therefore, the legislature requires that St. Nicholas Cathedral be administered subject to the American Church the ownership

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America. I was happy to be able to sign the Acts of the New York State Legislature in 1945 and 1948 which confirmed the members of the Russian Orthodox Greek Catholic Church in the possession of Saint Nicholas Cathedral in New York City, thus freeing it from the evil and sacrilegious influence of representatives of the Soviet.

I join you in looking forward to the time when all worshippers of the Orthodox Greek Church in the world will be free from the clutches of the Soviet Government.

Sincerely yours,

THOMAS E. DEWEY.

TED:RM.

of the property is not being taken from one group and vested in another. The ownership has always been in the appellee or its grantor subject to being used for the religious needs of the members of the respective corporations. Those members, as has been shown above, are made up of the whole body of worshippers, in the first instance, of the local congregation, then from 1905 to 1924 all of the worshippers in the diocese, from 1924 on all of the worshippers in the American Church.

The appellants contend that ownership vested in the Russian Orthodox Church "at large," meaning the whole Russian Orthodox Church throughout the world. They fail to cite any authorities establishing such a doctrine under the law of the state. The decided cases, even those upholding the statutory requirements of denominational control, give no indication that the full ownership of the property of a religious corporation is vested in anyone other than the members of the corporation. For example, in *Westminster Presbyterian Church* v. *Trustees of Presbytery*, 1918, 222 N. Y. 642, the plaintiff church was, in an ejectment action, adjudged to have record title and right of possession subject to the provisions of the article in the Religious Corporations Law relating to Presbyterian churches.

In decreeing that St. Nicholas Cathedral should be administered subject to the control of the American Church, the legislature did not deprive the Russian Church "at large," or Metropolitan Benjamin, or the Moscow hierarchy whom he represents, of property without due process of law; none of them had any property rights in the premises; the full ownership was in the plaintiff.

There is no proof as to the proportions in which the Russian Government and Church contributed to the cost of the premises. The Czar may have given much the larger share. At any rate no resulting trust was created.

III

No Substantial Federal Question Is Presented by the Fact That This Action Was Commenced One Day Before the Statute Became Effective.

When the action was commenced the sole defendant was the appellant Kedroff who was then occupying the property under a claim of right as representative of the schismatic Renovated Church. As against the appellee he had no color of right, statute or no statute. The canonically invalid status of the Renovated Church had become a matter of history.

The appellant Benjamin did not appear in the case until two years later. He then filed an answer, later amended, to the amended complaint which had been served on Kedroff on April 26, 1945. It is possible that when Benjamin intervened a supplemental complaint should have been served on him alleging the enactment of Article 5-C (Civil Practice Act, §§ 245, 245-a, 245-b), although usually a public domestic statute need not be pleaded (*Pine Grove Poultry Farm* v. *Newtown B.-P. Mfg. Co.*, 1928, 248 N. Y. 293, 297). If this was a defect, it may be corrected or disregarded at any stage of the action (C.P.A., § 105; *cf. Aktieselskabet etc.* v. *W. A. Kirk & Co.*, 1943, N. Y. Co. Sp. T., 180 Misc. 979, 981). In any event, the appellee has properly been adjudged the owner in fee. Its title and right of possession are subject to the provisions of the Religious Corporations Law as now existing (*Westminster Presb. Church* v. *Presbytery*, 222 N. Y. 612). That law, in § 107, defines the duty of the appellee's trustees, which is to administer the property in accordance with the rules of the American Church.

IV

No Substantial Federal Question Is Presented by the Remarks of the Court of Appeals in Regard to What Would Be the Disposition of the Case in the Absence of the Statute.

These remarks (302 N. Y. at p. 24) were not the ground on which the judgment was based. They lack the finality required for review either on appeal or on petition for certiorari.

V

No Substantial Federal Question Is Presented by the Alleged Failure of the Court of Appeals to Rule on the Defense of Limitations.

Prior to the motion for reargument in the Court of Appeals appellants had attempted to argue in all of the courts that the legal estate had vested in Benjamin as the "accredited Archbishop", pursuant to the statute of uses (Real Prop. L., §§ 92-93). As the appellants had consistently referred to Kedrovsky as an "accredited Archbishop" their argument would have resulted in vesting the legal estate in him also. Had they continued to maintain this position they might have argued, with some color of plausibility, that the possession of Kedrovsky from 1926 to 1934 and of his son Nicholas Kedroff from 1934 on (assuming that the father and son were in privity, as to which there is some question) was continuously adverse to the appellee's title and had ripened into a title by adverse possession to which Metropolitan Benjamin succeeded. That being the appellants' position it would have been necessary for the plaintiff to rely on the tolling of the statute under C.P.A. § 24.

However, on the motion for reargument the appellants expressly abandoned the position that the statute of uses

executed the legal estate in Metropolitan Benjamin, or, inferentially, in his predecessors. The appellants said (moving brief, pp. 18-19):

> "* * * There is no dispute about * * * the identity of the actual trustee in this case. Plaintiff holds the legal title, and is therefore the trustee of the cathedral. * * * Metropolitan Benjamin does not claim title or seek its transfer * * * There is nothing to prevent the exercise by plaintiff of its functions and prerogatives as sole and undisputed trustee of the cathedral * * * "

A similar concession is made in the Jurisdictional Statement.

Necessarily, the appellants must take the same position as to Metropolitan Benjamin's predecessors in occupancy. There is no proof that John Kedrovsky or Nicholas Kedroff made any claim of title or right of possession, adverse to the *legal title* of the plaintiff. In fact the very proof offered by the appellants in this case shows that Kedrovsky's occupancy was subject, and not adverse, to the title of the legal owner. At folios 396-398 the defendants' counsel introduced in evidence Finding of Fact No. 5 in the case of *Kedrovsky v. Rojdesvensky*, which read:

> "Title to the premises * * * are [*sic*] in the Russian Orthodox Saint Nicholas Cathedral [*sic*], a domestic, religious corporation, subject to a trust for the uses of said Russian Orthodox Church and the members thereof * * * "

The finding, of course, referred to the appellee's predecessor in title, since the appellee had not yet been created at the time when the earlier case was tried. But the finding does conclusively show that the right of occupancy awarded to Kedrovsky was *subject to the legal title*. Hence, occupation of the premises by Kedrovsky must be deemed to have

been, not adverse, but under and in subordination, to the legal title of the appellee (C.P.A. § 35[illegible] and the appellee, while not in actual occupancy, must be deemed to have been seized of the premises within fifteen years of the commencement of this action (§ 34).

The foregoing argument was presented to the Court of Appeals in the appellee's brief in opposition to the motion for reargument and was replied to by the appellants.

The question of whether the statute of limitations had been tolled by the injunctions against Platon and against the appellee had also been fully briefed on the main argument.

Since the court's attention was thus called to the defense on the motion for reargument, the denial of that motion must be deemed a ruling on the defense. The court was not required to express its views in an opinion.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
Counsel for Appellee.

(4708)